134-527

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 219.

DAVID C. WHITTEMORE, APPELLANT,

vs.

THE AMOSKEAG NATIONAL BANK ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED OCTOBER 19, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 23, 1889.

1 Circuit Court of the United States for the District of New Hampshire.

UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

At a stated term of the circuit court of the United States for the district of New Hampshire, begun and holden at Concord on the eighth day of October, A. D. one thousand eight hundred and eighty-five, before the Hon. Le Baron B. Colt, circuit judge, presiding, the following proceedings were had, to wit:

DAVID C. WHITTEMORE
vs.
THE AMOSKEAG NATIONAL BANK and Others, Defendants.

The bill of complaint in this cause was filed in the clerk's office on the ninth day of May, A. D. 1885, and was duly entered at the May term of this court, A. D. 1885, and is in the words and figures following, namely:

2 In the Circuit Court of the United States for the District of New Hampshire. In Equity.

DAVID C. WHITTEMORE
vs.
THE AMOSKEAG NATIONAL BANK, MOODY CURRIER, GEORGE B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver.

To the honorable the justices of the circuit court of the United States for the circuit within and for the first district of New Hampshire, sitting in equity:

David C. Whittemore, of Manchester, in said district, in his own behalf and in behalf of such stockholders of the Amoskeag National Bank, a corporation duly established under the laws of the United States and having its principal place of business at said Manchester, who may join therein, brings this his bill against the said Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver, all of Manchester aforesaid, and says—

(1.) That the said Moody Currier, during the years 1875 and 1876, was, and at the filing of this bill is, president of the said Amoskeag National Bank.

(2.) That the said George B. Chandler, during the years 1875 and 1876, was, and at the filing of this bill is, cashier of said bank.

(3.) That during the years 1875 and 1876 the said David B. Varney, John B. Varick, Moody Currier, Henry Chandler, John S. Kidder, Edson Hill, Reed P. Silver, together with John S. Elliott, late of said Manchester, deceased, and Stephen D. Green, late of

said Manchester, deceased, were the directors of said Amoskeag National Bank.

(4.) That the said Moody Currier, David B. Varney, and John B. Varick are, at the time of the filing of this bill, directors of said bank.

(5.) That the said David C. Whittemore is the owner of five shares of the capital stock of said Amoskeag National Bank.

(6.) That on the 13th day of July, 1875, the firm of Dunn, Harris & Co., composed of Cyrus Dunn and John T. Harris, both of said Manchester, was adjudicated bankrupt by the United States
3 district court for said district of New Hampshire, and thereafterwards one A. G. Fairbanks, of said Manchester, was appointed assignee.

(7.) That on the said 13th day of July, 1875, the said firm of Dunn, Harris & Co. was indebted to the said bank in about the sum of one thousand dollars and the said Cyrus Dunn was indebted to the said bank in about the sum of five thousand dollars.

(8.) That on the fourth day of October, 1875, the said firm of Dunn, Harris & Co. offered a composition of 15 per cent. to their creditors and the said Cyrus Dunn offered a composition of 20 per cent. to his creditors.

(9.) That the said bank, by vote of directors on the 23d day of November, 1875, constituted the said David B. Varney its agent in said bankruptcy proceedings.

(10.) That prior to the first day of December, 1875, before the acceptance of the composition by the creditors of said Dunn, Harris & Co. and said Dunn, the said Varney, agent as aforesad, acting in behalf of said bank, entered into an illegal and fraudulent agreement with said Dunn that, in consideration that the said bank, through the said Varney, should furnish the said Dunn with the money sufficient to carry out said compromise, the said Dunn would pay the said Varney for his services the sum of six thousand dollars ($6,000), which was about the sum due the said bank from said Dunn and said Dunn, Harris & Co., in addition to the sums to be furnished as aforesaid.

(11.) That the directors and officers of said bank, for and in behalf of said bank, furnished or allowed to be furnished from the funds of said bank about the sum of twenty thousand dollars in furtherance of this corrupt and illegal agreement without security.

(12.) That said acts on the part of said directors and officers were in violation of their duties and obligations to the stockholders of said bank; that said acts on the part of said directors and officers, acting as a board in behalf of said bank, were in violation of the charter of said bank and in violation of the laws of the United States under which said bank was established.

(13.) That said sum of twenty thousand dollars was used by the said Varney, agent as aforsaid, for and in behalf of said bank, with the knowledge and consent of the directors of said bank to a certain extent in purchasing claims against the said Dunn, for which a greater sum than twenty per cent. was paid, thus defrauding the other creditors of him, the said Dunn.

(14.) That the compromise of 20 per cent. was passed and confirmed with the claims so purchased by the said bank or those acting in its behalf.

(15.) That the United States district court for the district of New Hampshire, on the 23d day of December, 1875, ordered said compromise to be recorded, and on the 28th day of April, 1876, that the property of said Dunn be conveyed by Fairbanks, assignee, to said Varney, in pursuance of an agreement between the said Varney and the said Dunn.

4 (16.) That thereafterwards the said Varney conveyed the property received from said Fairbanks to the said bank.

(17.) That on the 16th day of April, 1880, the said district court set aside said composition, and on the 31st day of October, 1881, the said Fairbanks brought suit against said bank and Varney to recover the property so conveyed to said Varney, which suit the said district court decided in favor of the said assignee.

(18.) That on the fourth day of January, 1876, a note signed by Cyrus Dunn, D. B. Varney, and John B. Varick, all as principals, for the sum of $16,653.69 was given to said bank, which said sum of $16,653.69 was the money advanced by said bank, as above narrated, in excess of the cash received from the said assignee; that said note was entered on the books of said bank and included in the sworn returns of the officers of said bank as a part of the assets of said bank, as your complainant is informed and believes.

(19.) That, as your complainant is informed and believes, said note was presented to the national bank examiner by the officers of said bank as a portion of the assets of said bank.

(20.) That on the wrapper of said note is endorsed, "Interest settled to Jan. 1, 1877;" that said endorsement was made by the officers of said bank, acting for and in behalf of said bank, without receiving any equivalent therefor, and, as your complainant is informed and believes by vote of the board of directors of said bank, among whom were the said D. B. Varney and John B. Varick; that there are other endorsements on said note of the amounts received from the property of said Dunn, which the said bank has been ordered to restore to A. G. Fairbanks, assignee of said Dunn in bankruptcy; that on the wrapper of said note is an endorsement like the following: "Feb'y 20, 1879, rec'd $2,040 from Bur., C. R. & N. R. R.;" whereas, in truth and in fact, as your complainant is informed and believes, no such sum was ever paid by either of the signers of said note upon said note; that, as your complainant is informed and believes and so avers, the said bank, prior to the execution of said note, was the owner of two bonds of the Burlington, Cedar Rapids and Northern railroad for the payment of ($1,000) one thousand dollars each; that at some time prior to said 20th day of Feb'y, 1879, the said bonds had so depreciated in value that they had been charged to the profit and loss account on the books of said bank; that they had afterwards appreciated in value and were sold by said bank for the sum of ($2,040) two thousand forty dollars, which is the same sum endorsed on the wrapper of said note under

date of Feb'y 20, 1879, and said sum of ($2,040) two thousand forty dollars never was the property of either of the signers of said note.

(21.) That the said Moody Currier, president of said bank as aforesaid, has stated under oath as follows in reference to the payment of said note: "I shall not insist on Mr. Varney's paying it, but cannot say what the other directors may do, but I don't think the board will call upon him to pay it. I only speak for
5 myself, but I do not expect Mr. Varney to pay it. There is no understanding between me and Varney as to payment of the balance of the note."

(22.) That, as your complainant is informed and believes and so avers, *that* the said bank has expended large sums of money and become liable for large sums of money in defence of its said illegal and fraudulent acts, and in defence of the said illegal and fraudulent acts of its said officers and directors; the amount is unknown to your complainant, and he prays that the respondents may state the same under oath; that thereby the stockholders of said bank have been and will be defrauded.

(23.) That the directors and officers of said bank, acting for and in behalf of said bank, have allowed more than six years to elapse without any payment being made upon said note and without demanding the payment thereof; that, although the said Varney and the said Varick are both abundantly able to pay said note, no attempt has been made to collect the same or the interest thereon, and your complainant fears and believes that no effort will ever be made by the respondents to compel the payment of the same, and that thereby the stockholders of said bank will be defrauded.

Wherefore your complainant prays that the respondents, directors as aforesaid, may be decreed to pay to said bank whatever sum said bank may have lost by reason of this said illegal conduct; that a receiver may be appointed to collect said note, and for such other relief as may be just.

To the end, therefore, that the said respondents may answer all and singular the premises, and that the said Moody Currier and George B. Chandler upon their corporal oaths may answer—

(1.) Whether the said note of Jan'y 4, 1876, was not presented to the national bank examiner as part of the assets of said bank.

(2.) Was not said note of January 4, 1876, included in the return under oath made by the officers of said bank to the Comptroller of the Treasury.

(3.) Whether the said ($20,000) twenty thousand dollars was not furnished with the knowledge and consent of the directors of said bank.

(4.) Whether the note of Jan'y 4, 1876, was not given for the amount advanced by the bank in excess of the amount of cash received from the assignee.

(5.) Was anything paid to the bank by either of the signers of said note when endorsement of "Rec'd interest to Jan'y 1, 1877," was made? Was it not done by vote of directors of the bank?

6 (6.) Was not the sum of ($2,040) two thousand forty dollars which, under date of Feb'y 20, 1879, was endorsed on the

said note received from sale of two bonds of Burlington, Cedar Rapids & Northern railroad, which were the property of the bank?

(7.) Had not these bonds been charged to "profit and loss?"

(8.) Has either of the signers of said note ever paid anything on said note, either principal or interest; and, if so, what amounts and when?

(9.) Has any attempt been made to collect said note?

That the said David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver may, upon their corporal oaths, answer—

(1.) Whether the said ($20,000) twenty thousand dollars was not furnished with the knowledge or consent of the directors of said bank.

(2.) Has either of the signers of said note ever paid anything on said note, either principal or interest; and, if so, what amounts and when?

(3.) Has any attempt been made to collect said note?

(4.) What expense has the said bank incurred in defense of its said illegal acts and the said illegal and fraudulent acts of said officers and directors?

To the end, therefore, that the said respondents may, if they can, show why your complain-t should not have the relief hereby prayed, and may full, true, and perfect answer make to the various averments and interrogatories hereinbefore contained, may it please your honor to grant unto your complainant a suit [writ] of *subpœna ad respondendum* issuing out of and under the seal of this honorable court and directed to the said respondents, The said Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver, commanding them, at a certain day and under a certain penalty, to be and appear in this honorable court and there to make answer in the premises and to stand and to abide such order and decree as may be made.

D. C. WHITTEMORE.

H. G. WOOD, *Of Counsel.*

7 UNITED STATES OF AMERICA, }
District of New Hampshire. }

Personally appeared David C. Whittemore, the complainant in the foregoing bill, and, being by me first duly sworn, deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true except as to matters therein stated on information and belief, and as to those he believes it to be true.

Subscribed and sworn to before me this 4th day of May, A. D. 1885.

[SEAL.] FRANK C. LIVINGSTON,
Notary Public.

On the first day of July, A. D. 1885, the defendants filed their demurrer in words, &c., as follows:

Circuit Court of the United States, District of New Hampshire. In Equity.

DAVID C. WHITTEMORE
vs.
THE AMOSKEAG NATIONAL BANK, MOODY CURRIER, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver. } No. 189.

Demurrer.

The joint and several demurrer of the above-named respondents to the bill of complaint of David C. Whittemore, the above-named complainant.

These respondents, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be proved in such manner and form as the same is therein set forth and alleged, do demur to said bill and for causes of demurrer show—

8 That the complainant hath not in and by his said bill made or stated such a case as entitled him in a court of equity to any discovery from said respondents or either of them or to any relief against them or any of them as to the matters contained in the said bill or any of such matters, and, among other reasons—

1st. Because it appears in said bill that the causes of complaint therein alleged are such as should be passed upon and determined, if at all, by the said Amoskeag National Bank or its directors, and it does not appear in said bill that either of them has ever passed upon or determined said questions.

2d. Because it does not appear by the said bill that said Amoskeag National Bank was or that a majority of its directors were unable or unwilling to institute suits for the recovery of the sums which said complainant prays in his said bill may be decreed to be paid over to said bank or to collect the note mentioned in said bill or that demand or request to institute such suits has ever been made on said bank or its directors, and because it appears by said bill that such suits ought to be instituted by said bank or its directors, if at all.

3d. Because it appears by said bill that the complainant has been guilty of laches in filing his said bill.

4th. Because it does not appear by said bill that the complainant was a stockholder in said Amoskeag National Bank at the time of either of the acts of which he complains.

5th. Because it appears that the personal representatives of J. S. Elliott and Stephen D. Green in said bill named are necessary parties to said bill.

And as to so much of said bill as relates to the causes of action, if any, arising from the payment of the sum of twenty thousand dollars alleged in the 13th clause of said bill, because it appears by

said bill that said causes of action, if any, accrued more than six years before the filing of said bill within the meaning of sec. 3, chapter 221, of the General Laws of New Hampshire relating to the limitation of actions.

And as to so much of said bill as relates to the note mentioned therein, because it appears by said bill that the cause of action arising from said note, if any, accrued more than six years before the filing of said bill within the meaning of sec. 3, chapter 221, of the General Laws of New Hampshire relating to the limitation of actions, and because it appears by said bill that said note was
9 without consideration and void and the same could not be collected, and the relief prayed for in relation to the same would be ineffectual.

And because it does not appear by said bill that there is any cause for the appointment of a receiver as prayed.

And for further cause of demurrer show that it appears by the said bill that several and distinct and independent matters are improperly joined therein for that it is prayed that the respondent directors be decreed to pay over to said bank the sums alleged to have been paid out in the 13th clause of said bill, and also that a receiver be appointed to collect the note given for a part of said sum, which prayers are inconsistent with each other, and that the said bill is altogether multifarious.

Wherefore, and for divers other good causes for demurrer appearing in said bill, respondents demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

By LIVERMORE & FISH,
Of Counsel for Respondents.

I hereby certify that in my opinion the above demurrer is well founded in point of law and that it is not interposed for delay.

THOS. L. LIVERMORE,
Of Counsel.

STATE OF NEW HAMPSHIRE, *Hillsborough,* } *ss:*

JUNE 29TH, 1885.

Then the above-named respondent, George B. Chandler, appeared and made oath that the above demurrer is not interposed for delay.

[SEAL.] JOHN M. CHANDLER,
Notary Public.

10 And now, thereafter, at the October term of said court, to wit, on the 27th day of October, A. D. 1885, the following amendment to the plaintiff's bill is filed by consent:

United States Circuit Court for the District of N. H. Oct. Term, 1885.

In Equity.

DAVID C. WHITTEMORE
vs.
AMOSKEAG NAT'L BANK *et al.*

The plaintiff moves to amend his bill as follows: By adding to the fourth allegation of said bill, after the last words thereof, the following: "That, as your complainant is informed and believes, the said Henry Chandler, Edson Hill, and Reed P. Silver are at the time of the filing of this bill directors of said bank, and, together with the said Currier, Varney, and Varick, constitute a majority of the board of directors of said bank."

By adding to the seventeenth allegation of said bill, after the last words thereof, the following: On the twenty-seventh day of March, 1885, that from the said decree of said district court the said bank has appealed, and said appeal is still pending in this court.

HORACE G. WOOD,
Counsel for Plaintiff.

This may be filed.

Demurrer to stand to bill as amended.

T. L. LIVERMORE,
Of Counsel for Respondent.

11 And on said 27th day of October, A. D. 1885, the cause came on to be heard upon bill and demurrer before the Hon. Le Baron B. Colt, the complainants being represented by their [his] counsel, Wood and Clark, and the defendants by their counsel, Livermore & Fish; and on the third day of December, A. D. 1885, the opinion of the court is handed down and filed as follows:

Circuit Court of the United States, District of New Hampshire.

DAVID C. WHITTEMORE
vs.
AMOSKEAG NATIONAL BANK *et al.* } No. 189.

Rescript.

There being no allegation in this bill that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved on him since by operation by law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and the plaintiff failing to set forth in the bill any efforts made to secure such action as he desires on the part of the managing directors or trustees and the causes of his failure to obtain
12 such action, as prescribed by equity rule 94 of the Supreme Court, we think it clear that the demurrer to the bill must be sustained.

We fail to see the force of the plaintiff's objection that rule 94 does not apply to this case either by reason of the character of the allegations contained in his bill or by reason of the fact that, as he contends, the rule does not apply to a stockholder of a national bank in consequence of the language contained in section 5139 of the Revised Statutes. Rule 94 was adopted by the Supreme Court after careful consideration of the whole subject to which it relates. It prescribes in a certain class of cases a mode of procedure, and it makes no exceptions to the class of cases which are governed by it. With the rule before us we find no valid grounds upon which to sustain the plaintiff's position.

Demurrer sustained.

And thereafter, to wit, on the third day of May, A. D. 1886, a decree is duly entered here in court as follows:

Circuit Court of the United States, District of New Hampshire. In Equity.

DAVID C. WHITTEMORE
vs.
13 THE AMOSKEAG NATIONAL BANK, MOODY CURRIER, George B. Chandler, David B. Varney, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver. } No. 189.

Decree.

The cause coming on to be heard on bill and demurrer in the presence of counsel for the plaintiff and for all the defendants above named, this court doth order that the plaintiff's bill do stand demurred out of this court, with costs to be paid by the plaintiff, David C. Whittemore, to the said defendants.

WILLIAM H. HACKETT, *Clerk.*

And on the eleventh day of the same May the same David C. Whittemore here in open court claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute his appeal to effect and answer all damages and costs if he fail to make his appeal good, which security is accepted by the court, and said appeal is allowed accordingly.

A true record.

Attest: WILLIAM H. HACKETT, *Clerk.*

14 (*Bond to Party on Appeal.*)

Know all men by these presents that we, David C. Whittemore Andrew C. Wallace, and John C. Nichols, all of Manchester, in the county of Hillsborough and State of New Hampshire, are held and firmly bound to the Amoskeag Nat'l Bank, a corporation duly existing by law and doing business at said Manchester; D. B. Varney,

Moody Currier, G. B. Chandler, Edson Hill, R. P. Silver, Henry Chandler, John B. Varick, J. S. Kidder, all of said Manchester, in the sum of five hundred dollars, to be paid to said Amoskeag Nat'l Bank, Varney, Currier, G. B. Chandler, Hill, Silver, Henry Chandler, Varick, and Kidder; to the payment whereof we, jointly and severally, bind ourselves and our respective heirs firmly by these presents.

Sealed with our seals and dated the 14th day of May, A. D. 1886.

The condition of this obligation is: Whereas the said D. C. Whittemore commenced suit in the United States circuit court for the district of New Hampshire against the said bank *et al.*, which said suit has been decided in favor of said bank; and whereas the said Whittemore has appealed from the said decision to the United States, Supreme Court:

15 Now, therefore, if the said Whittemore shall prosecute his said appeal and, if he fail to make his said appeal good, shall answer all damages and costs that may be recovered by said bank *et al.* in said suit, then this obligation shall be void.

D. C. WHITTEMORE. [SEAL.]
A. C. WALLACE. [SEAL.]
JOHN C. NICHOLS. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN COMODIN, to J. C. N.
G. E. FRENCH, to A. C. W. & D. C. W.
HENRY S. CLARK.

Approved:

LE BARON B. COLT,
U. S. Cir. Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the district of New Hampshire.

Attest: WILLIAM H. HACKETT,
Clerk of Circuit Court of the U. S. for District of N. H.

16 UNITED STATES OF AMERICA, *District of New Hampshire*, } *ss:*

I, William H. Hackett, clerk of the circuit court of the United States for the first circuit and district of New Hampshire, certify that the foregoing is a true copy of the record and of all proceedings in the cause of David C. Whittemore against The Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver, in said circuit court determined.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portsmouth, in said district, on the

thirteenth day of July, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of Circuit Court, New Hampshire.]

WILLIAM H. HACKETT, *Clerk.*

Endorsed on cover: New Hampshire C. C. U. S. No. 219. David C. Whittemore, appellant, *vs.* The Amoskeag National Bank *et al.* Filed October 19, 1886.

Office Supreme Court U. S.
FILED.
FEB 19 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 219.

IN EQUITY.

DAVID C. WHITTEMORE,

Appellant,

vs.

AMOSKEAG NATIONAL BANK ET AL.,

Appellees.

APPELLANT'S BRIEF.

H. G. WOOD,
Of Counsel.

Evening Post Job Print.

UNITED STATES CIRCUIT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

OCTOBER TERM, 1889.

IN EQUITY.

DAVID C. WHITTEMORE

vs.

AMOSKEAG NATIONAL BANK ET AL.

APPELLANT'S BRIEF.

Statement of the Case.

The bill charges the defendant corporation and its officers, who are made parties defendant, with having done acts which were in excess of its corporate powers.

"The said acts on the part of said directors and officers were "in violation of their duties and obligations to the stockhold- "ers of said bank; that said acts on the part of said directors "and officers, acting as a board in behalf of said bank, were in "violation of the charter of said bank, and in violation of the "laws of the United States under which said bank was estab- "lished."

It also alleges that the plaintiff is a stockholder in the defendant bank, and is therefore pecuniarily affected by the fraudulent acts complained of. "That said bank has expended large sums "of money and become liable for large sums of money in defense "of its said illegal and fraudulent acts, and in defense of the "said illegal and fraudulent acts of said directors, the amount "is unknown to your complainant, and he prays that the re- "spondents may state the same under oath: that thereby the "stockholders of said bank have been and will be defrauded."

It also alleges that substantially the same officers who had the management and control of the defendant corporation when the acts complained of were committed, are in control and still have the management of it when this bill was brought.

The fraudulent and illegal acts charged against the defendants are:

First. That the corporation as such, through the vote and active concurrence of its officers, entered into a fraudulent and illegal scheme to secure the passage of a fraudulent compromise in the matters of one Cyrus Dunn, and Dunn, Harris & Co., before the Court of Bankruptcy for the District of New Hampshire.

That the fraudulent character of the whole transaction has been established in that Court, in proceedings brought for that purpose, the compromise having been set aside, and the bank, in a suit brought by the assignee of said Dunn, having been directed to pay to the assignee the proceeds of the bankrupt's property received by it, by means of such unlawful scheme.

The fraud alleged is:

"That prior to the first day of December, 1875, before the "acceptance of the composition by the creditors of said Dunn, "Harris & Co. and said Dunn, the said Varney, agent as afore- "said, acting in behalf of said bank, entered into an illegal and "fraudulent agreement with said Dunn, that in consideration "that the said bank through the said Varney should furnish "the said Dunn with money sufficient to carry out said com- "promise, the said Dunn would pay the said Varney for his ser- "vices the sum of six thousand dollars ($6,000), which was "about the sum due the said bank from said Dunn and said "Dunn, Harris & Co., in addition to the sums to be furnished as "aforesaid."

That under said arrangement the sum of about $20,000 was furnished by said defendant bank. That with the money so furnished, the said Varney, acting in behalf of the defendant bank, purchased claims against the said Dunn, paying therefor more than the sum provided by the resolution of composition, and with the claims so purchased, the resolution of compromise was passed, thus defrauding the creditors of said Dunn.

April 16, 1880, the compromise was set aside as fraudulent by the Court, and subsequently, at the March Term, 1885, the District Court for the District of New Hampshire, on a bill brought by the assignee in bankruptcy of Cyrus Dunn, directed the defendant bank to return to the assignee the money received by it from the bankrupt estate of said Dunn.

That on the 4th of January, 1876, the defendant bank, to cover its fraudulent transactions in the matter of the compromise of the estates of the bankrupts before referred to, took the promissory note of Cyrus Dunn, one of the bankrupts, and of David V. Varney and John B. Varick, two of the directors of the bank, for the sum of $16,653.60, which was the sum furnished by it to procure the compromise of the bankrupt estates

of Dunn, Harris & Co. and of Cyrus Dunn, in excess of the amount received by it from the assignee in bankruptcy.

That this note was used and treated as a part of the assets of the bank, and included in its sworn returns as a valid outstanding obligation.

That upon the wrapper of said note there were several entries of payments upon said note, as: "Interest settled to Jan. 1st, 1877," "Feb. 20, 1879, Rec'd $2040, from Bur., C. R. & No. R. R."

That no payments were in fact ever made upon said note, and that the endorsements thereon were fraudulent and made for the purpose of deceiving the stockholders and bank examiner.

That no attempt has ever been made to collect said note, and the Statute of Limitations was permitted to run thereon before the bringing of this bill.

That the president of the bank, Moody Currier, one of the defendants, in his sworn testimony before the Register, in the matter of the assignee in bankruptcy against the defendant bank before referred to, said: "I shall not insist on Mr. Varney paying it" [the note before referred to]; "I don't think the bank will call upon him to pay it."

The bill further charges that said bank, in defense of said illegal and fraudulent acts, has expended large sums of money, and become liable for large sums of money, the amount of which is unknown to the plaintiff, and that thereby the stockholders have been *and will be* defrauded.

The plaintiff prays relief as follows:

"That the respondents, directors as aforesaid, may be decreed "to pay the said bank whatever sum said bank may have lost "by reason of their said illegal conduct, that a receiver may be "appointed to collect said note, and for such other relief as may "be just."

The defendants demur to the bill:

First. As to the first two causes of demurrer, that the corporation or its directors have never passed upon said question, and because it does not appear that the said bank was unable or unwilling to institute said suit, or that demand or request has ever been made upon said corporation to institute said suit.

REASONS WHY RULE 94 DOES NOT APPLY TO THIS CASE.

The plaintiff insists that no request or demand upon the corporation in this case to bring an action was necessary to enable the plaintiff, a stockholder, to bring the action.

1st. Because the bill shows that the acts of the corporation, and of the individual directors, were *ultra vires*, illegal and fraudulent, and that the corporation still persists in and upholds

its action, by defending the suit brought by the assignee of the estate of Cyrus Dunn to recover the property received by it through the fraudulent and illegal action of the corporation as such, thus bringing the plaintiff's *status* within the rule announced in

Heath v. *Erie R. R.*, 8 *Blatch.* (*U. S. C. C.*), 347.
Dodge v. *Woolsey*, 18 *How.*, 331.
Memphis v. *Dean*, 8 *Wall.*, 73.
Hawes v. *Oakland*, 104 *U. S.*, 450.
Huntington v. *Palmer*, 104 *U. S.*, 482.

The rule announced in

Hawes v. *Oakland*, 104 *U. S.*, 450.
Dannmeyer v. *Coleman*, 11 *Fed. Rep.*, 97.

only applies where the ground of complaint is of acts on the part of the corporation or its officers relating to matters of internal concern, which are *intra vires*, and which the corporation and its officers, or at least its stockholders, can ratify and validate, and has no application whatever where the acts forming the basis of the action are *ultra vires*, illegal and fraudulent, and not susceptible of being ratified by the corporation, its officers or stockholders.

Blatchford, *J.*, in

Heath v. *Erie R. R. Co.*, 8 *Blatch.*, 347.

sets forth the rule in the latter class of cases. He says: "Now, "so far as the bill sets forth the acts *ultra vires* in issuing stock "and breaches of trust, which are a fraud on the stockholders, "such acts and breaches of trust are beyond the power of the "corporation or its directors to affirm, sanction or make good," and he adds, "in such case the authorities agree that the reason "of the rule for an application to the corporation or its board "of directors to bring the suit does not exist"; and such also is the rule in the English courts.

Clinch v. *Financial Cor.*, *L. R.*, 5 *Eq.*, 450; see p. 479.
Atwell v. *Merryweather*, *L. R.*, 5 *Eq.*, 450, note.
Mennier v. *Hooper's Tel. Works*, *L. R.*, 9 *Ch.*, 350.

And in *Mennier* v. *Hooper's Tel. Works*, James, *L. J.*, says:

"It is said that this is not the right form of suit, because ac- "cording to the principles laid down in *Foss* v. *Harbottle*, and "other similar cases, the Court ought to be very slow indeed in "allowing a shareholder to file a bill where the company is the "proper plaintiff. This particular case seems to me precisely "one of the exceptions referred to by V.-C. Wood, in *Atwood* "v. *Merryweather*, a case in which the majority were the de- "fendants, the wrong-doers who were alleged to have put the "minority's property into their pockets. In this case, it is right

" and proper for a bill to be filed by one shareholder on behalf " of himself and all the other stockholders."

That the Supreme Court. in *Hawes* v. *Oakland* and *Huntington* v. *Palmer*, did not intend to overrule the doctrine of this case where the acts complained of are *ultra vires*, or illegal or fraudulent, is evident—

1st. Because the Court does not refer to the case which at time had become a leading case under this head; and,

2nd. Because the rule announced by the Court would impose upon an injured stockholder supererogatory and useless action, because the question in dispute could not be settled in any of the modes pointed out in the rule.

Again the Court followed and cited with approbation the cases of

Foss v. *Harbottle*, 2 *Hare*, 461;
Mozeley v. *Alston*, 1 *Ph.*, 730, and
McDougall v. *Gardnier*, *L. R.*, 1 *Ch. Div.*, 13;

and in all of these cases it was conceded that cases might arise " where," to use the language of the Court in *Foss* v. *Harbottle*, " the claims of justice would be found superior to the technical " rules respecting the modes in which corporations are required " to sue."

In *McDougall* v. *Gardnier*, from which Miller, *J.*, cites with marked approval the rule announced by the Court, James, *L. J.*, gives the true interpretation to the rules adopted in the earlier English cases referred to. He said: "I am of the opinion that " the demurrer ought to be allowed. I think it is of the utmost " importance to all these companies that the rule which is well " known in this Court as the rule in

" *Mozeley* v. *Alston*, 1 *Ph.*, 790, and
" *Foss v. Harbottle*, 2 *Hare*, 461, and
" *Lord* v. *Copper Miners' Co.*, 2 *Ph.*, 740,

" should always be adhered to; that is to say, that nothing con- " nected with internal disputes between the shareholders is to be " made the subject of a bill by some one shareholder on behalf " of himself and others, unless there be something illegal, op- " pressive or fraudulent, unless there be something *ultra vires* " on the part of the company or on the part of the majority of " the company, so that they are not fit persons to determine it; " and that every litigation must be in the name of the com- " pany, if the company really desire it."

But this opinion of James, *L. J.*, as well as Mellish, *L. J.*, and Bagallay, *L. J.*, all show that the above rule is only intended to apply to that class of cases *where the corporation or its shareholders have the right to sanction or to ratify the acts complained of, and has no application to those acts which are*

ultra vires, or illegal, especially where the bill shows that the corporation is by reason of its conduct unfit to have the conduct of the suit, because in antagonism with the subject matter of the action.

The same Judge, in the later case of *Mennier* v. *Hooper's Tel. Works*, stated the exceptions to the rule, as hereinbefore stated.

Rule 94, which is founded upon *Hawes* v. *Oakland* and *Huntington* v. *Palmer*, clearly shows the construction which the Court intended to have put upon the doctrine of that case, to wit, that it is to be confined to bills brought by a stockholder founded on a right which may properly be asserted by the corporation, and has no application whatever where the ground of action is an *ultra vires*, illegal and fraudulent act of the corporation and its officers.

In the latter class of cases the corporation has no right to, and neither it or its directors can ratify or validate the act, and any effort on the part of the stockholders to secure satisfactory action by it or them, would be supererogatory and useless—and courts of equity never impose such duties upon a party who comes within its jurisdiction with apparent equitable right.

That neither the corporation, its officers or stockholders, can ratify an *ultra vires*, illegal or fraudulent act. See

Thomas v. *Railroad Co.*, 101 *U. S.*, 71.

In that case a lease was made by the defendant of its railway for twenty-five years, without legislative authority. At the end of five years the corporation resumed possession of the road, and although the rents for that period had been paid by the lessee, and accepted by the corporation, it was held that no action could be maintained against it on the lease, because the corporation by its acts could not give validity to the lease.

Therefore, as from the bill itself it appears that any effort to secure a settlement of the subject matter of the action within the corporation itself would have been futile and useless, the rule, so far as it relates to that portion of it, requiring the plaintiff to set forth the means adopted by him to secure such action, has no application.

If the bill shows that such action would have been fruitless, and contains sufficient to operate as an excuse for not taking measures to induce the corporation to act, it meets fully all the requirements of the rule.

Tazewell County v. *Farmers' Loan & Trust Co.*, 12 *Fed. Rep.*, 752.

In this view of the case, the question remains whether the bill discloses such a state of facts as excuses the plaintiff from requesting the corporation to institute a suit for the subject matter.

We insist that it does—

First. Because the corporation is still under the control of the

same executive officers who were parties to the acts complained of.

Brewer v. *Boston Theatre Co.*, 104 *Mass.*, 378.

Second. Because the corporation is still actively engaged in litigating the questions involved in the action brought by the assignee in bankruptcy of Cyrus Dunn against it for the identical fraud complained of in this bill, and the bringing of an action by it for the matters embraced in the plaintiff's bill would operate as a stultification of itself, and as a concession that its action in that case was illegal, fraudulent and criminal.

This operates as an ample excuse for not having made such a request upon the corporation, and raises a presumption within the rule established by the cases, that such a request would have been an idle ceremony.

Tazewell County v. *Farmers' Loan & Trust Co.*, 12 *Fed. Rep.*, 752.

Brown v. *Buffalo R. R. Co.*, 27 *Hun* (*N. Y.*), 342.

Young v. *Drake*, 8 *Hun* (*N. Y.*), 61.

So also, we insist that within the rule stated in *McDougall* v. *Gardnier*, *ante*, it already appears from the bill that the defendant corporation and its officers are unfit to have control of the litigation.

Harlan, *J.*, *in Tazewell County* v. *Farmers' Loan & Trust Co.*, 12 *Fed. Rep.*, 752, decided in July, 1882, six months after the adoption of rule 94, and the point made by the defendant that the action may have been brought before the rule was adopted, does not affect the effect of the decision as an interpretation of the rule.

The rule is no more than a reiteration of the doctrine of *Hawes* v. *Oakland*, *ante*, and as an interpretation of one, is an interpretation of the other, and that by one of the Judges who participated in the making of both the decision and the rule. Again, the Court makes the exception unequivocally and unconditionally, and as a general rather than as a special doctrine.

Effect of Statute upon the Rule.

The rights of a stockholder in a national bank are fixed by statute, and rule 94 can have no application as to them.

Revised Statutes, U. S., 5139–5239.

Under the statute a transferee of stock in a national bank is invested with all the rights and subjected to all the liabilities of the transferer of such stock, and this includes all rights of action which might exist in any of the transferers of such stock.

Sec. 5239 renders the directors liable for all damages which the association, its shareholders or any other person, shall have sustained in consequence of the willful misappropriation of the funds of the corporation.

An action by a stockholder against a corporation for a loss resulting from an *ultra vires*, illegal or fraudulent act, or to restrain it from a contemplated transaction of that character, may be maintained, and must be sanctioned by the Court, although all the other stockholders of the corporation are willing to assent to and affirm tho proposed course of action; and the reason for this is that the remedy is not for the benefit of one stockholder, but for the benefit of all, and the other stockholders cannot be denied their rights simply because the one bringing the bill is not equitably entitled.

Dupont v. *Northern Pacific Railroad Co.*, 18 *Fed. Rep.*, 467.

THE APPELLANT HAS NOT BEEN GUILTY OF LACHES, WHICH ESTOPS THE REMEDY.

2d. As to the ground of demurrer. The plaintiff has not been guilty of laches which disentitle him to equitable relief.

The word *laches* in its ordinary significance means negligence, but as a legal term *it signifies unreasonable delay in the assertion of a right*, and is only interposed as a bar to the assertion of a right where the delay operates to the serious disadvantage of the party against whom it is asserted.

They are treated as in the nature of an estoppel, and in order to be operative, the circumstances must be such as to make the delay amount to such an acquiescence on the part of the plaintiff as would make it inequitable for the Court to permit the right to be asserted against the defendant.

Platt v. *Platt*, 58 *N. Y.*, 646.
Pacific R. R. Co., of Mo. v. *Mo. Pacific R. R. Co.*, 2 *McCr.*, 227.

The rule may be said to be, that lapse of time, in equity, is never permitted to defeat a right, only upon the ground of estoppel, or of raising a presumption that the right has been abandoned.

Nelson v. *Carrington*, 4 *Munf.* (*Va.*), 332.
Mason v. *Crosby*, 1 *W. & M.*, 341.
Gatchell v. *Jewett*, 4 *Me.*, 350.

And a reasonable cause for the delay always excuses it.

King v. *Monford*, 1 *N. J. Eq.*, 274.
Glenn v. *Hebt*, 12 *G. & J.* (*Md.*), 271.
Aylet v. *King*, 11 *Leigh* (*Va.*), 486.

Parties are required to use reasonable diligence in the enforcement of their rights, but in determining the question of diligence *all the circumstances will be regarded.*

Ellison v. *Maffit*, 1 *John.* (*N. Y.*), 46,

and even though the claim has been outstanding a long time, if

the excuse for the delay is reasonable, the right of the party will not be defeated, either upon the ground of laches or acquiescence.

Mason v. *Crosby*, 1 *Davies*, 303.
Gatchell v. *Jewett*, 3 *Me.*, 350.
Kimball v. *Jones*, 17 *Vt.*, 430.
Bancroft v. *Andrews*, 6 *Cush.*, 493.
Lunn v. *Johnson*, 3 *Ired.* (*N. C.*) *Eq.*, 70.

In this case the bill discloses a very good excuse for delay.

The note of Dunn, Varney and Varick covered the main ground of complaint, and until the Statute of Limitations run upon it, the plaintiff has a right to presume it would be paid. In this case the defendants concealed and covered up their fraud by the note referred to, and they cannot now claim that they were lulled into security by the laches of the plaintiff.

Again, so long as the question whether the acts complained of were illegal and fraudulent remained in abeyance, so long as it was being litigated by the proper parties before a court of competent jurisdiction, and until the question was settled by the Court, it would seem that it was the part of wisdom and good judgment on the part of this plaintiff to refrain from bringing this suit.

REASONS WHY THE APPELLANT MAY RECOVER, ALTHOUGH NOT A STOCKHOLDER WHEN THE ACTS COMPLAINED OF OCCURRED.

3d. As to the fourth ground of demurrer.

It is not essential that the bill should show, or that the fact should be, that the plaintiff was a stockholder at the time of the acts complained of.

As we have already stated, Rule 94 has no application except where the bill relates to matters of internal concern which can be settled by the corporation, its officers, or stockholders, and this is true in respect to this objection.

It would be preposterous to suppose that the Supreme Court by this rule intended to deny relief to a stockholder who had a pecuniary interest, and who shows that he is damaged by an illegal act of the corporation or its officers, which even if it was commenced before he came into possession of his stock, is, as the bill shows, continued up to and after the bringing of this bill, simply because he was not a stockholder when the act was done. The rule only relates to those grounds of complaint which are apparently within the scope of the powers of the corporation, and which can be ratified and validated by the acquiescence of the stockholders, and has no application where the act is one which acquiescence cannot validate, or where under the statute all rights of action pass with the stock.

The reason for the rule is, that a person who becomes a stockholder in a corporation, in the legitimate management of whose

affairs there is ground of complaint, by becoming a stockholder after certain acts within the power of the corporation to do, but as to the wisdom of which there may be just grounds of difference, acquiesces in and assents to such management so that he is equitably estopped from bringing an action predicated thereon, and because the right of action existing in a holder of the stock at the time of the commission of the act, does not, at the common law, pass by a transfer of the stock.

But being an arbitrary rule, and one which, if extended beyond its legitimate scope, might result in defeating a clear equitable right, it will be strictly construed, and so as to uphold a right not clearly coming within its limits.

The cases to which the rule applies are those in which the damages alleged are purely speculative, and where the act complained of is one of unwisdom, and it has no application where the damages are real and susceptible of ready estimation, and result from an illegal and fraudulent act, and where by statute the right of action passes with the stock by transfer.

While a stockholder in a corporation has no legal title to the corporate property, yet he has an interest therein to the extent of his stock. He has a right to have the business of the corporation conducted in a legal manner, to have the funds applied only to the legitimate conduct of the enterprise contemplated by the charter, and if the funds of the corporation have been illegally applied, or have been used in an enterprise foreign to that for which the corporation was established, he has a right to have them restored by the guilty parties.

Again, "Every person becoming a shareholder, by such trans-
"fer, shall in proportion to his shares, succeed to all the rights
"and liabilities of the prior holders of such shares."

Revised Statutes, U. S., 5139.

And this embraces all rights of action.

At the common law, choses in action not being assignable, a right of action existing before its transfer would not pass with the stock, but under this statute it would pass, and the Supreme Court has no power, and never intended to deny a remedy to an assignee where it is made transferable by statute.

It will not be contended but that, at the time of the acts complained of, the stock of the plaintiff was possessed by some one, either himself or some other person, and that that person, whoever he might be, had the right, so far as this objection is concerned, to sue. This being so, the right passed under the statute to his assignee. The right to sue attaches to the owner of the shares, and under the statute follows their transfer.

No one would seriously contend, that in case of a deficiency in a bank, because A's ownership of the shares was acquired after the deficiency occurred, he would thereby escape from assessment; and if liable to pay because of the deficiency, it would hardly be equity to say that because he was not a stockholder at

the time the deficiency occurred he could have no remedy against those parties whose illegal and tortious acts caused the deficiency.

Can it make a particle of difference whether it be the capital or the surplus of the bank that is misapplied, and diverted from its proper use?

The principle upon which that part of Rule 94 which relates to the necessity of an averment that the plaintiff was a stockholder when the cause of action arose, is predicated, is, that at the common law choses in action are not assignable, so as to confer upon an assignee a right to sue thereon in his own name; therefore, where a cause of action, legal or equitable, arises *before* the transfer of stock, the right of action does not pass to the assignee.

In the case of stockholders in a National Bank the statute saves this right, by the provision that the transferee "shall succeed to all the rights and liabilities of the *prior holders* of such shares," and this clearly embraces *all* rights of action. In other words, the statute saves to the transferee not only such rights as his immediate transferor may have had under the stock, but the right which any of the *previous holders* thereof may have possessed, as the plural "*holders*" is employed.

The distinction between the effect of a transfer of stock at common law, and under this statute is, that in the former case, only such rights pass *as at common law can pass to the assignee*, while under this statute *all* rights pass *whether they would pass under the common law or not*, with the additional advantage that all the rights which attached to the stock in the hands of any previous holders pass.

In other words, all the rights of any holders of the stock under this statute *attach to and run with it*, and pass by transfer to the transferee. It appearing in the bill that the plaintiff is a stockholder in a National Bank established under the laws of the United States, and that the defendant corporation is a National Bank, and the bank, shares of whose stock the plaintiff holds, it was unnecessary to allege that the plaintiff was a stockholder at the time of the commission of the acts, or that there was no collusive practice for the purpose of conferring jurisdiction on the Court; because the statute being a public statute, the Court will take judicial notice of its provisions, not only as to the rights of stockholders, and the jurisdiction it confers upon the Court, but also of the time it takes effect, and its construction.

Gardner v. *The Collector*, 6 *Wall.*, 499.

And where the language of the law is explicit and involved in no obscurity, there is no room for construction.

Doe v. *Considine*, 6 *Wall.*, 458.

Again, the bill on its face discloses that the defendants are still engaged in the furtherance of the acts complained of, and

are still expending money to that end, against which the bill seeks relief, so that in any view, without reference to the statute, the demurrer could not stand.

But we insist that the statute overrides the rule and that the Supreme Court never intended to deprive the holder of stock in a National Bank of a right or remedy given him by the statute, and yet this would be the effect of the rule if it were to be enforced against an assignee of such stock, who took his stock by transfer after the act complained of had been entered upon, because the only remedy which a stockholder has against directors as such for their illegal or fraudulent acts in the management of the affairs of the corporation, is in equity.

A right without a remedy would be anomalous, and where the statute confers a right, and it has vested, no subsequent statute can defeat it. The remedy may be changed *but it cannot be denied*, and as the statute conferred the right, and as the only remedy is in equity, this rule could not deny the remedy without providing another, which the Court has no power to do.

Fontain v. *Ravenel*, 17 *How.*, 384, *pp.* 558, 570.

Common sense and every rule of construction ever applied to statutes or rules, alike repel any inference that the Court ever intended this rule to apply, where, as in this case, the statute vests the transferee of stock with all the rights of any prior transferors.

In New York, and some other States in which choses in action are made transferable by statute, it is held that the circumstance that the person bringing the bill was not a stockholder at the time of the commission of the acts complained of, is no objection, because he takes the stock with all the rights of the previous holders.

Young v. *Drake*, 8 *Hun* (*N. Y.*), 61.
Ramsay v. *Erie R. R. Co.*, 8 *Abb. Pr.*, *N. S.*, 174.

"It is enough," says Gilbert, *J.*, in Young *v.* Drake (*ante*), "that the plaintiff was a stockholder when the action was brought."

If this is the rule under a statute merely relating to choses in action, why is it not the rule under a statute expressly providing that a transferee "shall succeed to all the rights *of any prior holders*" ?

PERSONAL REPRESENTATIVES OF ELLIOTT AND S. D. GREEN NOT NECESSARY PARTIES.

4th. As to the fifth ground of demurrer.

The personal representative of J. S. Elliott and S. D. Green are not necessary parties to the bill.

Sec. 5239, Revised Statutes of the United States provides: "If "the directors of any national banking association shall know-

" ingly violate, or knowingly permit any of the officers, agents or " servants of the association to violate any of the provisions of this " Title, * * * and in case of such violation, every director " who participated in or assented to the same shall be held liable " in his personal and individual capacity for all damages which " the association shall have sustained in consequence of such " violation."

The bill charges a violation of the statute, and we submit that the bill discloses that it was done knowingly. If the defendants were to say that they did not know that by paying certain of the creditors larger sums than those who were compelled to accept the compromise received, that this latter class of creditors were defrauded, we hardly think the statement would be believed.

The liability is *individual* and *personal.*

The cause of action arises out of a tort, and the liability of *tort feasors* is not joint, but either one or all may be pursued at the election of the plaintiff.

All tort are joint and several, and the plaintiff may recover against one defendant, though the other be acquitted.

Reutgen v. *Kanowrs*, 1 *McL. C. C.*, 18.
Milne v. *Huber*, 3 *McL.*, 212.

Under the statute creating it, the liability being *personal* and *individual*, the liability ceased with the death of the director. At common law,

" The personal representatives of the deceased cannot be sued " for torts committed by him."

Dicey on Parties to Actions, p. 505.

Non-joinder can only be taken advantage of by plea in abatement.

Reed v. *Hussey*, 1 *Bl. & H.*, 525;
Berry v. *Foyles*, 1 *Pet.*, 311;

unless the defect of parties appears upon the face of the bill.

There is no allegation in the bill that the deceased directors actively participated in the fraud, or that they were guilty of official negligence which contributed thereto.

There is a distinction between a fraud which may be said to be contractual, that is, which grows out of a contract, *and one which grows out a breach of an official duty, or a legal obligation.* In the former case it may, with some propriety, be claimed that all contracting parties should be joined, although we do not admit even this; *but where the fraud results from the breach of official duty, or an obligation imposed by law, or a breach of*

trust, the action is purely tortious and all the living guilty parties may be joined or not at the election of the plaintiff.

But in no case can the representatives of a *tort feasor* be made parties to a bill or action for a fraud, because the right of action, unless preserved by the statutes, *dies with the person*. In this view, which I believe is undoubted, the plaintiff has joined all the parties as defendants who are interested, and the bill is not open to demurrer on that ground.

Craft v. *Russell*, 67 *Ala.*, 9.

Each director is liable for his own fraud and not for that of his associates on the board, therefore, none but those who participated in the fraud should be sued,

Cargill v. *Bower*, *L. R.*, 10 *Ch. Div.*, 502;

and the participation of each in the fraud charged must be proved, and will not be presumed.

STATUTE OF LIMITATIONS DOES NOT APPLY, REASONS WHY.

5th. The Statute of Limitations of the State of New Hampshire has no application, the plaintiff's right of action is given by Section 5239 of the Revised Statutes of the U. S., and cannot be barred by the State statute. The liability being created by statute is a specialty obligation and is only barred by such a period as bars that class of claims, which in New Hampshire is twenty years.

Gen. Laws of N. H., *Chap.* 221, *Par.* 4.

See, also, sustaining this view, in a case arising under the N. H. statute, opinion of Story, *J.*, in

Bullard v. *Bell*, 1 *Mason.*, 243.

Again, if the Statute of New Hampshire might be set up in bar of the plaintiff's remedy, yet the remedy, being predicated on the fraudulent acts of the defendant, and the bill showing that the fraud was concealed by the defendants by taking the note of Dunn, Varney and Varick, and the subsequent endorsements made upon it; the statute does not begin to run until the fraud was discovered.

Way v. *Cutting*, 20 *N. H.*, 187.
Douglas v. *Elkins*, 28 *N. H.*, 26.
Bailey v. *Glover*, 21 *Wall.*, 344.
Kirby v. *Lake Shore, &c., R. R. Co.*, 7 *Sup. Ct.* (*U. S.*) *Rep.*, 430.

The plaintiff's right of action did not arise until the fraud was

finally consummated by permitting the statute to run upon the note of Dunn *et al.* This note was given upon the fourth day of Jan., 1876, therefore the statute did not run upon it till the fourth of Jan., 1882, and had the endorsements upon it been genuine the statute would not have run against it at the time of the bringing of this bill, and the statute would not begin to run as to the plaintiff, according to the view most favorable to the defendants, until Jan. 5, 1882. Up to that time, at least, it was a continuing fraud to which the statute did not apply, but the Statute of Limitations has no application to cases of this character unless the statute is applied to them in express terms.

The statute is adopted by courts of equity by way of analogy, *but only in cases where its jurisdiction is concurrent with that of a court of law.*

Goddell v. *Kemmell*, 99 *U. S.*, 201.
Elmendorf v. *Taylor*, 10 *Wh.*, 153.
Hunt et als. v. *Wickliff*, 2 *Pet.*, 201.
The U. S. v. *Daniel*, 12 *Pet.*, 32.

And the statute might be pleaded at law.

Coulson v. *Wilson*, 9 *Pet.*, 62.

And where the remedy is purely equitable, and the jurisdiction of that Court is original and exclusive, the statute has no application.

McDonald v. *McDonald*, 8 *Yerg.*, 145.
Warner v. *Daniels*, 1 *W. & M.*, 91.
Singleton v. *Moore*, *Rice* (*Sc.*) *Ct.*, 110.
Marsh v. *Oliver*, 14 *N. J. Eq.*, 259.
Atty.-Genl. v. *Piermont*, 5 *Paige Ch.*, 620.
Union Bank v. *Safford*, 12 *How.*, 326.

An apt illustration is to be found in the case of legacies and express trusts generally. They are not within the operation of the statute, because they are purely of equitable jurisdiction.

Platt v. *Oliver*, 2 *McL.*, 267.
do *do.* 3 *How.*, 333.
Prevost v. *Gratz*, 6 *Wh.*, 481.
Bridgman v. *Gill*, 24 *Beav.*, 302.

The remedy in this case is purely equitable; a stockholder has no remedy at law against a director of a corporation either for fraud or breach of trust, but must proceed in equity in such a manner as to protect all the stockholders and creditors.

Allen v. *Curtis*, 26 *Conn.*, 455.
Craig v. *Gregg*, 83 *Penn. St.*, 19.
Greaves v. *Gage*, 69 *N. Y.*, 164.
Allen v. *N. J. Southern R. R. Co.*, 47 *How. Pr.* (*N. Y.*), 14.

Again, where the bill seeks a remedy for fraud, equity does not apply the statute, but will grant relief, even though the action is barred at law.

Lord Cottenham in *Hovenden* v. *Annesley*, gave expression to the rule in equity when a bill is brought for fraud. He said: "A court of equity will wrest property fraudulently acquired, "not only from the perpetrator of the fraud, but from his children and his children's children." And in a later English case, *Hueguenin* v. *Beasley*, 14 *Ves.*, 273, "from any persons "to whom he may have parcelled out the fruits of his fraud."

While in some cases advantage of the Statute of Limitations may be taken by demurrer, yet we insist that this can only be done when the bill shows that the statute has run upon the *entire* claim of the plaintiff.

In this case the bill prays for relief, not only against the original fraud, but also for money expended in the continuance and prosecution of the fraud within six years, in defending the bill brought by the assignee in bankruptcy to recover the property and money received by it and them in pursuance of the fraud. (See allegation 22, p. 4 of the bill.)

This, of itself, is a complete answer to the demurrer so far as the Statute of Limitations is concerned, because it is well settled, and must in the very nature of things be the rule that, if the bill is good as to any part of its allegations which are met by demurrer, the demurrer cannot be sustained.

Livingston v. *Story*, 9 *Pet. U. S.*, 633.
Atwell v. *Ferret*, 2 *Black. U. S. C. C.*, 39.

As to Duplicity.

6th. The prayer of the bill is not, under the circumstances detailed in the bill, open to the objection of duplicity.

The bill is brought to recover whatever loss the corporation has sustained by the illegal, fraudulent and *ultra vires* acts of its directors, and until the question, whether the note of Dunn *et al.* is a legal obligation which can be enforced, is determined, it would be impossible to determine for what amount the judgment should be.

Again, the corporation being *in pari delicto* with the directors in reference to the fraud, might be estopped to collect it.

Bushnell v. *Chautauqua County Bank*, 10 *Hun*, 378.

But in the hands of a Receiver, an officer of the Court, the note having been given to conceal and cover up the fraud, and the signers of the note being parties to the fraud, they, the signers of the note, might be estopped, were they to set up the defense that the note was without consideration. So

that, until the value of the note is determined, it would seem that the amount for which judgment should be rendered against the defendants cannot be ascertained.

AS TO JURISDICTION.

7th. The Circuit Court had jurisdiction of this action. The action arises under sections 5209 and 5239, and the Act of July 2, 1882, has no relation to actions arising under those sections.

H. G. WOOD,
Attorney for Appellant.

H. G. WOOD,
Of Counsel.

Office Supreme Court U. S.
FILED,
JAN 27 1890
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CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 219.

DAVID C. WHITTEMORE, *Appellant*,

v.

THE AMOSKEAG NATIONAL BANK ET AL.

BRIEF FOR APPELLEES.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 219.

DAVID C. WHITTEMORE, Appellant,

v.

THE AMOSKEAG NATIONAL BANK ET AL.

BRIEF FOR APPELLEES.

WANT OF JURISDICTION.

It appears by the bill of complaint that all the parties were citizens of the state of New Hampshire, and there is no other ground for jurisdiction. Reference is made upon this point to the motion to dismiss, and the brief in support thereof filed on behalf of the appellees.

RULE 94.

The bill alleges (sec. 5) that the appellant "is the owner of five shares" of the appellee the Amoskeag National Bank, but it does not allege that he was a shareholder at the time of the transactions of which he complains, and it does not set forth any efforts on his part to secure any action by the shareholders as required by Rule 94.

The right to maintain a bill in equity against a corporation or its directors is limited to those who were shareholders

at the time of the transactions complained of by Rule 94 which is a statement of the law as laid down in —

Hawes v. *Oakland*, 104 U.S. 450, 461,
Dimpfell v. *Ohio & Miss. R.R. Co.*, 110 U.S. 209, 210,
Venner v. *Atchison, T. & S. F. R.R. Co.*, 28 Fed. Rep. 581, 589,
Quincy v. *Steel*, 120 U.S. 241, 246,
Lee v. *Union Pacific R.R. Co.*, 19 Fed. Rep. 283, 285,
Foote v. *Cunard Mining Co.*, 17 Fed. Rep. 46,
Dannmeyer v. *Coleman*, 11 Fed. Rep. 97, 100,
Sparhawk v. *Union Pac. R.R.*, 54 Penn. St. 426.

That Rule 94 applies to shareholders in national banks notwithstanding the provision of Revised Statutes, section 5139, that transferees of shares in national banks shall "succeed to all the rights and liabilities of the prior holder of such shares," is apparent, because this provision of the statute is merely declaratory of the result of a transfer of shares in all corporations at common law, which "means the substitution of a new shareholder in place of an outgoing shareholder in the company, and an assumption by the former of all the rights and obligations which attach to the transferring shareholder by reason of his ownership of the shares."

Morowitz on Corporations, 2d ed., sec. 159.

If the allegation that the directors of the bank at the time of the transactions complained of constitute a majority of the present directors excuses the appellant from efforts to secure action on their part, it does not excuse him from efforts to secure action by the shareholders. Where the case admits

of delay, application must be made to the shareholders if the directors will not act; for although the directors represent the corporation for the time being, they are not the corporation.

Hawes v. *Oakland*, 104 U.S. 450.
Huntington v. *Palmer*, 104 U.S. 482.
Greenwood v. *Freight Co.*, 105 U.S. 13.
Detroit v. *Dean*, 106 U.S. 537.
Dimpfell v. *Ohio & Miss. R.R. Co.*, 110 U.S. 209.
Taylor v. *Holmes*, 127 U.S. 489, 492.
Foss v. *Harbottle*, 2 Hare, 461.
McDougall v. *Gardiner*, L.R. 1 Ch. D.W. 13.
Forbes v. *Whitlock*, 3 Edw. Ch. 446.
Talbott v. *Scripps*, 31 Mich. 268.
Cogswell v. *Bull*, 39 Cal. 320.

"It is not to be presumed that the body of the corporators will tolerate a wrong in their elective officers by which they are themselves defrauded."

Brewer v. *Boston Theatre Co.*, 104 Mass. 393.

Unwillingness of the stockholders to sanction a suit cannot be inferred from mere delay.

Hersey v. *Veazie*, 24 Me. 12.

The cases which hold that an act *ultra vires* may be the foundation of a bill in equity by a shareholder against the directors or the corporation have no application here, because they are confined to giving *preventive* remedy against a threatened act *ultra vires*, excepting where the majority of the shareholders are interested to resist the complaining shareholder. In this case there is no allegation that the majority of the shareholders are interested one way or

the other. Without this the Court will not inquire into the validity of a transaction which complainant seeks to have set aside.

Dimpfell v. *Ohio & Miss. R.R. Co.*, 110 U.S. 209.

See also,

Le Warne v. *Mexican Int. Imp. Co.*, 38 Fed. Rep. 629.
Foote v. *Cunard Mining Co.*, 17 Fed. Rep. 46.
Dannmeyer v. *Coleman*, 11 Fed. Rep. 97.
Mozely v. *Alsoon*, 1 Phill. 790, 800.
Russell v. *Wakefield W. W. Co.*, L.R. 20 Eq. 474, 477.

The question here is not whether the payment of the twenty thousand dollars complained of shall be restrained. It has been paid. That the payment was *ultra vires* could do no more than make it the debt of the officers. They profited nothing by it. It was at most a mistake of judgment in the supposed interest of the shareholders, and the question now is whether suit shall be prosecuted against them to recover back this sum, and this is essentially a question for the present shareholders to settle. They at least should be allowed to discuss it.

"There may be a great many wrongs committed in a company; there may be claims against directors; there may be claims against officers; there may be claims against debtors; there may be a variety of things of which the company may well be entitled to complain, but which, as a matter of good sense, they do not think it right to make the subject of litigation."

McDougall v. *Gardiner*, Law Rep. 1 Ch. Div. 22.

The fact that the bank is defending a suit brought by the assignee in bankruptcy to recover the property of the bank-

rupt which was conveyed to the bank as alleged in sections 15 and 16 of the bill of complaint has no bearing, because it does not appear that the title to this property in any way depends upon the validity of the acts of the officers of the bank, and if it did the shareholders of the bank would not be estopped to elect a new board of directors to maintain suit against their old officers on the ground that their acts were *ultra vires*, even while contending in the other suit that these acts were valid.

Rev. Sts. sec. 5239 is not pertinent to this case, for the remedy there given against directors of national banks is for violation of "any of the provisions of this title," *i.e.*, Title 62 of the Revised Statutes, and this has no reference to misapplication of funds by the officers of banks.

Brinckerhoff v. *Bostwick*, 88 N.Y. 52.
Conway v. *Halsey*, 44 N.J. L. 462.
Trenholm v. *Commercial Nat. Bank*, 38 Fed. Rep. 323.

LACHES.

The payment of $20,000 complained of was made prior to December 23, 1875, as appears in sections 11 and 15 of the bill of complaint, and it is alleged in section 18 that the note in question was given January 4, 1876. The bill was filed May 9, 1885, more than nine years after these transactions.

The evidence relating to these transactions must necessarily have become less distinct and less available during the lapse of so long a time, and two of the directors who were directly concerned in them and whose testimony would have been material, died while the complaint now before the Court was slumbering. Under such circumstances it is incumbent on the complainant to specifically set forth in his bill what

were the impediments to an earlier filing of his bill, and without this a court of equity will treat his claim as a stale one.

Marsh v. *Whitmore*, 21 Wall. 185.
Godden v. *Kimmell*, 99 U.S. 201, 212.
Peabody v. *Flint*, 6 Allen, 52.
Gregory v. *Pachett*, 33 Beav. 595.

It does not excuse the delay, that the note given by the bankrupt and two of the directors to the bank for a portion of the $20,000 as alleged in section 18 of the bill did not become barred by the statute of limitations until 1882, for this note was without consideration, and the complainant, knowing the acts now complained of, was in no way misled or barred of his action by this note.

The pendency of the suit by the assignee against the bank for the recovery of the bankrupt's property is not material, for it is not alleged that the determination of that suit in any way depended on establishing the invalidity of the acts here complained of. (See Bill of Complaint, secs. 15, 16, 17.)

THE STATUTE OF LIMITATIONS.

The cause of action arising from the payment of the $20,000 is barred by the statute of limitations of New Hampshire. See ch. 221, Gen. Laws, which requires all personal actions to be brought within six years, there being no allegation of any concealment which will take this case out of the statute.

Miller v. *McIntire*, 6 Pet. 61.
Moore v. *Green*, 19 How. 69.
Bacon v. *Howard*, 20 How. 22.

New Albany v. *Burke*, 11 Wall. 96, 107.
Meath v. *Phillips County*, 108 U.S. 553.
Ware v. *Galveston Co.*, 111 U.S. 170.

This objection may be taken by demurrer,

Rhode Island v. *Massachusetts*, 15 Pet. 233,

and under Rule 32 it will lie to a part of the bill as well as the whole.

A RECEIVER UNWARRANTED.

The bill asks for the appointment of a receiver to collect the note of January 4, 1876. As this note is barred by the statute of limitations of New Hampshire, it could not be collected by a receiver, and the demurrer to this part of the bill is well founded on this ground.

Furthermore, it is not the practice in the English chancery courts (whose practice furnishes the rule, *Penn* v. *Wheeling Bridge*, 13 How. 518) to appoint a receiver to bring a suit in a court of law for a corporation without placing its whole affairs in his hands.

FREDERICK P. FISH,
THOS. L. LIVERMORE,
of Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM, 1889.

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THE AMOSKEAG NATIONAL BANK ET AL.

MOTION TO DISMISS APPEAL.

And now come the Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver, appellees, and move that the appeal of David C. Whittemore, appellant, be dismissed for want of jurisdiction, and state as their reasons, —

1. That the parties were not at the time of filing the bill of complaint citizens of different states, as appears by the allegation of the bill of complaint that appellant and appellees were all citizens of the state of New Hampshire.

2. That the grant of jurisdiction to the Circuit Courts by section 629, clause 10, of the Revised Statutes, in "suits by or against any banking association established in the district for which the court is held," was repealed by the act of congress of July 12, 1882, chapter 290, section 290.

3. That no other fact is stated in the bill of complaint which gave jurisdiction of this cause to the Circuit Court for the district of New Hampshire or this court.

By FREDERICK P. FISH,
THOS. L. LIVERMORE,
Solicitors and of Counsel.

Office Supreme Court U. S.
FILED.
DEC 10 1889
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CLERK.

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BRIEF FOR APPELLEES ON MOTION TO DISMISS APPEAL.

I.

The objection of want of jurisdiction may be raised at any stage of the case, and it is not necessary to plead it, except to contradict the record.

Sullivan v. *Fulton Steamboat Co.*, 6 Wheat. 450.
Peale v. *Phipps*, 14 How. 369.
Boom Co. v. *Patterson*, 98 U.S. 403.
Grace v. *American Cent. Ins. Co.*, 109 U.S. 278.
Hartog v. *Memory*, 116 U.S. 588.

II.

Jurisdiction must appear affirmatively on the record.

Turner v. *Bank of North America*, 4 Dall. 8.
Ex parte Smith, 94 U.S. 455.

Robertson v. *Cease*, 97 U.S. 646.
Grace v. *American Cent. Ins. Co.*, 109 U.S. 278.
Bors v. *Preston*, 111 U.S. 252.

III.

The bill of complaint alleges that one of the defendants is a national bank, but by the act of July 12, 1882, chapter 290, section 4, it is provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking association may be doing business when such suits may be begun."

This act repealed clause 10 of section 629 of the Revised Statutes, which gave the Circuit Court jurisdiction of suits by or against national banks, and the fact that a national bank is a party no longer gives jurisdiction.

Leather Manuf. Bank v. *Cooper*, 120 U.S. 778.
Nat. Bank of Jefferson v. *Fore*, 25 Fed. Rep. 209.
Union Nat. Bank v. *Miller*, 15 Fed. Rep. 703.

Revised Statutes, section 5239, has no reference to misapplication of funds by the directors of a national bank.

Brinckerhoff v. *Bostwick*, 88 N.Y. 52.
Conway v. *Halsey*, 44 N.J. L. 462.
Trenholm v. *Commercial Nat. Bank*, 38 Fed. Rep. 323.

The "wilful misapplication" referred to in section 5209

must be for the benefit of the directors, and not for the benefit of the bank, as charged in this case.

United States v. *Britton*, 107 U.S. 655.
United States v. *Harper*, 33 Fed. Rep. 471.

FREDERICK P. FISH,
THOS. L. LIVERMORE,
of Counsel for Appellees.